NO. 90-474

SUPREME COURT OF THE UNITED STATES

OCTOBER 1990 TERM

JOSEPH M. WARD,

PETITIONER (PLAINTIFF)

V

THE DAILY REFLECTOR, INC.,
ALVIN TAYLOR

RESPONDENTS (DEFENDANTS)

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI TO
THE NORTH CAROLINA SUPREME COURT

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PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED FOR REVIEW

The Respondents disagree with Petitioner's presentation of the Questions Presented For Review and submit in lieu thereof, the following:

WHETHER THE ACTIONS OF THE APPELLATE COURTS OF THE STATE OF NORTH CAROLINA AFFIRMING DISMISSAL OF PETITIONER'S CLAIMS PURSUANT TO THE PROVISIONS OF RULE 12(b)(6) AND RULE 41(a)(1) OF THE NORTH CAROLINA RULES OF CIVIL PROCEDURE INVOLVE ANY LEGITIMATE FEDERAL QUESTIONS COGNIZABLE BY THE SUPREME COURT OF THE UNITED STATES?

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I. THE ACTIONS OF THE APPELLATE COURTS OF THE STATE OF NORTH CAROLINA AFFIRMING DISMISSAL OF PETITIONER'S CLAIMS BASED UPON HIS VIOLATION OF RULE 12(b)(6) OF THE NORTH CAROLINA RULES OF CIVIL PROCEDURE WERE PROPER AND DO NOT INVOLVE ANY LEGITIMATE FEDERAL QUESTIONS COGNIZABLE BY THE SUPREME COURT OF THE UNITED STATES.

The Respondents maintain that the action of the trial court granting their Motion to Dismiss pursuant to the provisions of Rule 12 (b)(6) of the North Carolina Rules of Civil Procedure was clearly justified based upon the controlling authorities in this jurisdiction. The Respondents' Rule 12 (b)(6) Motion to Dismiss was properly presented and directed to test the legal sufficiency of both the Petitioner's complaint in general, as well as the individual claims included therein. The trial court subsequently granted the

Respondent's Rule 12 (b)(6) motion "...as to the plaintiff's (Petitioner's) false light invasion of privacy claim". Appendix, p 5(b).

A complaint is without merit and may be dismissed pursuant to Rule 12 (b)(6) if there is an absence of law to support a claim of the sort made, if there is an absence of fact sufficient to make a good claim, or if there is a disclosure of facts which will necessarily defeat the claim. Oats v. Jag, Inc., 314 N. C. 276, 333 S. E. 2d 222 (1985). In order to withstand a motion to dismiss pursuant to Rule 12 (b)(6), the complaint must provide sufficient notice of the events and circumstances from which the claim arises, and must make allegations sufficient to satisfy the substantive elements of at least some recognized claim. Harris v. NCNB National Bank, 85 N. C. App. 669, 355 S. E. 2d 838 (1987). A claim should be dismissed under Rule 12(b)(6) where it appears that the

plaintiff is entitled to no relief under any statement of facts which could be proven. Peoples Sec. Life Insurance Company v. Hooks, 322 N. C. 216, 367 S. E. 2d 647 (1988).

In the present action, the Petitioner places great reliance and bases his complaint in large part upon the false light invasion of privacy tort. The North Carolina Supreme Court has heretofore firmly and finally refused to recognize the branch of the invasion of privacy tort arising from publicity by which the defendant places the plaintiff in a false light in the public eye. Renwick v. News and Observer, 310 N. C. 312, 312 S. E. 2d 405 (1984). In upholding the trial court's dismissal of plaintiff's claims pursuant to defendant's Rule 12 (b)(6) motion, the Court in Renwick stated:

> We will not expand the tort of invasion of privacy recognized in this jurisdiction to include "false light" invasions of privacy...the precise question presented by the plaintiff here - whether publicity by a defendant which places a plaintiff in a false light before

the public gives rise to a claim for which relief can be granted upon a theory of invasion of privacy. A plaintiff must recover in such situations, if at all, in an action for libel or slander ... Our continuing "consideration of the constitutional right of free speech and of a free press" guaranteed by the First Amendment to the Constitution of the United States, as well as a proper interest in judicial efficiency, leads us to reject the concept of a separate tort of false light invasion of privacy. Two basic concerns argue against the recognition of a separate tort of false light invasion of privacy. First, any right to recover for a false light invasion of privacy will often either duplicate an existing right of recovery for libel or slander or involve a good deal of overlapping with such rights. Second, the recognition of a separate tort of false light invasion of privacy, to the extent it would allow recovery beyond that permitted in actions for libel or slander, would tend to add to the tension already existing between the First Amendment and the law of torts in cases of this nature ... Given the First Amendment limitations placed upon defamation actions by Sullivan and upon false light invasion of privacy actions by Hill, we think that such additional remedies as we might be required to make available to plaintiffs should we recognize false light invasion of privacy claims are not sufficient to

> justify the recognition in this jurisdiction of such inherently constitutionally suspect claims for relief. Additionally, the recognition of claims for relief for false light invasions of privacy would reduce judicial efficiency by requiring our courts to consider two claims for the same relief which, if not identical, would not differ significantly. We reject the notion of a claim for relief for false light invasion of privacy in this jurisdiction. The trial court correctly dismissed this plaintiff's claims based upon this theory for failure to state a claim upon which relief could be granted. Renwick v. News and Observer, 310, N. C. 312, 321-326, 312 S.E. 2d 405, 414-419 (1984).

Recently, the North Carolina Supreme Court had the opportunity to consider recognition of yet another branch of the invasion of privacy tort based upon truthful public disclosure of private facts. In Hall v. Post, 323 N. C. 259, 372 S. E. 2d 711 (1988), the Court relied upon and reaffirmed its holding in Renwick, supra, in rejecting invasion of privacy claims based upon truthful public disclosure of private facts:

> Although expressing constitutional and other reservations, this Court has recognized a general right of privacy as a part of the tort law of this State. See Flake v. News Co., 212 N. C. 780, 195 S. E. 55 (1938) (recognizing the "appropriation" branch of the tort). However, we have not recognized or applied either of the two branches of the tort which,

> because they arise from publicity, most directly affect First Amendment speech and press rights. Quite to the contrary, we have refused to recognize the branch of the invasion of privacy tort arising form publicity by which the defendant places the plaintiff in a false light in the public eye. Renwick v. News and Observer, 310 N. C. 312, 312 S. E. 2d 405 (1984). We did so because "false light" claims often would duplicate or overlap existing claims for relief ... Additionally, "recognition of a separate (false light) tort ... would tend to add to the tension already existing between the First Amendment and the law of torts ... For the same reasons, we now hold that claims for invasions of privacy by publication of true but private facts are not cognizable at law in this State." Hall v. Post, 323 N. C. 259, 265, 372 S. E. 2d 711, 717 (1988).

"The general law of the right to privacy, as a matter of tort law, is mainly left to the law of the states..." Annotation, Supreme Courts' Views As To The Federal Legal Aspects Of The Right Of Privacy 43 L. Ed. 2d 871,875-76. This Court, however, in deciding the case of New York Times v. Sullivan, 376 U.S. 254 (1964) held

that the First Amendment itself imposes significant limitations upon state claims for libel and slander. Subsequently, the Court decided Time, Inc. v. Hill, 385 U.S. 374 (1967) which extended First Amendment protections, at least as stringent as those required by Sullivan, to defendants in cases for false light invasion of privacy.

> We believe that we will : create a grave risk of serious impairment of the indispensable service of a free press in a free society if we saddle the press with the impossible burden of verifying to a certainty the facts associated in news articles with a person's name, picture or portrait, particularly as related to nondefamatory matter. Time, Inc. v. Hill, 385 U.S. 374, 389 (1967) (emphasis added).

It is submitted that the decision of the North Carolina Supreme Court in Renwick v. News and Observer, 310 N.C. 312, 312 S.E. 2d 405 (1984), and as applied in the present action resulting in dismissal of Petitioner's claims based upon false light invasion of privacy, is in full and complete conformity

with the decisions of the Supreme Court of the United States. According, the Petitioner's Petition for Writ of Certiorari does not present any legitimate federal questions cognizable by this Court.

II. THE ACTIONS OF THE APPELLATE COURTS OF THE STATE OF NORTH CAROLINA AFFIRMING DISMISSAL OF PETITIONER'S CLAIMS BASED UPON HIS VIOLATION OF RULE 41(a)(1) OF THE NORTH CAROLINA RULES OF CIVIL PROCEDURE WERE PROPER AND DO NOT INVOLVE ANY LEGITIMATE FEDERAL QUESTIONS COGNIZABLE BY THE SUPREME COURT OF THE UNITED STATES.

Rule 41(a)(1) of the North Carolina Rules of Civil Procedure provides:

> ... Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any Court of

> this or any other State or of the United States, an action based on or including the same claim. N. C. G. S. 1A-1, Rule 41(a)(1) (emphasis added).

The "two dismissal rule" of N. C. G. S. 1A-1, Rule 41(a), as it is commonly referred to, was intended to prevent delays and harassment by a plaintiff securing numerous dismissals without prejudice. 9 C. Wright and A. Miller, Federal Practice and Procedure, Sec. 2368 at 189 (1971). "G.S. 1A-1, Rule 41 (a)(1) provides that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of this or any other State or of the United States, an action based on or including the same claims". Parrish v. Uzzell, 41 N. C. App. 479, 483, 255 S. E. 2d 219, 223 (1979).

In a recent case involving the identical issue presented to the North Carolina Courts in the present action, the trial court granted defendant's summary judgment motion

on the basis of plaintiff's violation of the the "two dismissal rule". In affirming the action of the trial court, the North Carolina Court of Appeals stated:

> The issue raised by plaintiff's appeal is whether plaintiff's second voluntary dismissal of the claim constituted an adjudication on the merits under N. C. Gen. Stat. Sec. 1A-1, Rule 41 (a)(1), thus barring plaintiff from bringing the third action on this claim. We hold that it does and affirm summary judgment for defendant... This "two dismissal" rule as it is called, was intended to prevent delays and harassment by a plaintiff securing numerous dismissals without prejudice... The requirements of the two dismissal rule are... met under Rule 41 (a)(1)... The purpose of the two dismissal rule - to prevent abuse and harassment by a plaintiff securing numerous dismissals without prejudice - is advanced in this case. City of Raleigh v. College Campus Apartments, Inc. 94 N. C. App. 280, 281-284, 380 S. E. 2d 163, 164-167 (1989).

Like City of Raleigh, Id., and irrespective of Petitioner's imaginative generalizations alleging the presence of broad constitutional issues, the Appendix to

the present Petition For Writ of Certiorari clearly reflects that the actions of the North Carolina courts involved no more or no less than a determination of whether Petitioner violated a state procedural rule. It is submitted that the trial court's Order dismissing Petitioner's action for violation of the "two dismissal rule" of N.C.G.S. 1A-1, Rule 41(a)(1), which action was affirmed by the North Carolina appellate courts, was entirely proper. Aside from the correctness of said rulings, however, it is equally clear that the present Petition For Writ of Certiorari fails to present any legitimate federal questions cognizable by this Court.

CONCLUSION

The Respondents maintain that the actions of the appellate courts of the State of North Carolina affirming dismissal of Petitioner's claims pursuant to the provisions of Rule 12(b)(6) and Rule 41 (a)(1) of the

North Carolina Rules of Civil Procedure do not involve any legitimate federal questions cognizable by the Supreme Court of the United States. Accordingly, the Respondents respectfully request the Court to deny the Petitioner's Petition For Writ Of Certiorari.

Respectfully submitted, this the 11th day of October, 1990.

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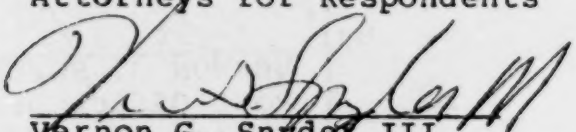
STRICKLAND & SNYDER
Attorneys for Respondents



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CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Brief In Opposition To Petition For Writ of Certiorari were mailed to the Petitioner by placing true copies of same in the United States mail, postage prepaid, and addressed as follows:

Dr. Joseph M. Ward
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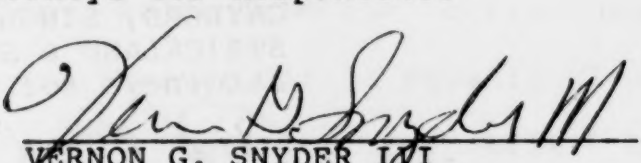
Ayden, NC 28513

This the 11th day of October, 1990.

GAYLORD, SINGLETON, McNALLY,
STRICKLAND & SNYDER
Attorneys for Respondents

By: 

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